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Filing date: **06/04/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92049073
Party	Defendant Michael Marryshow
Correspondence Address	Franklin B. Molin Kirkpatrick & Lockhart, Preston Gates Ellis LLP 1500 Oliver Building Pittsburgh, PA 15222 UNITED STATES Franklin.molin@klgates.com
Submission	Motion to Dismiss - Rule 12(b)
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Signature	/Franklin B. Molin/
Date	06/04/2008
Attachments	Marryshow Motion to Dismiss.pdf (3 pages)(8995 bytes) Marryshow Proposed Order for Motion To Dismiss.pdf (1 page)(3217 bytes) Marryshow Brief In Support of Motion To Dismiss.pdf (5 pages)(17636 bytes) Gordo Enterprises Petition For Cancellation.pdf (3 pages)(9714 bytes)

In re Registration of
Michael Marryshow
Registration No. 3,206,010
Registered: February 6, 2007
Mark: DUB WISE plus Design
International Class 25

Registrant.

Cancellation No. 92049073

**REGISTRANT'S MOTION TO DISMISS PURSUANT TO
RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE**

Pursuant to 37 CFR § 2.116 and Federal Rule of Civil Procedure 12(b)(6), Registrant, Michael Marryshow¹, by and through its undersigned attorneys, K&L Gates, moves for dismissal of the Petition for Cancellation (the “Petition”) filed by petitioner, Gordo Enterprises, Inc. (“Petitioner”), for failure to state a claim upon which relief may be granted.

¹ Mr. Marryshow's name is misspelled in the U.S. PTO Records as "Michael Maryshow". The proper spelling is used in this answer.

I. BACKGROUND

1. On or about March 26, 2008, Petitioner filed a petition to cancel Registrant's registered mark, Dub Wise, alleging in his one-line petition only that "We have been using the 'dub' on apparel in class 25 long before defendant."
2. Petitioner did not allege any facts other than this one line.
3. Petitioner did not allege that Registrant's mark has caused a likelihood of confusion, mistake, or deception with Petitioner's mark.

II. MOTION TO DISMISS

4. For the reasons set forth at greater length in Registrant's brief in support of this motion, Petitioner's petition fails to state a claim on which relief can be granted.
5. A proposed order is attached.

WHEREFORE, Registrant respectfully requests this Board dismiss the Petition for Cancellation with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Respectfully submitted,

/s/ Franklin B. Molin

Franklin B. Molin, Esq.
Joy J. Royes, Esq.
KIRKPATRICK & LOCKHART, PRESTON
GATES ELLIS LLP ("K&L GATES")
1500 Oliver Building
Pittsburgh, PA 15222
(412) 355-6251
Franklin.molin@klgates.com

Attorney for Registrant
Michael Marryshow

Dated: June 4, 2008

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION TO DISMISS was served by first class mail on this day, June 4, 2008, upon the following:

John Scott Gordon
Gordo Enterprises Inc.
427 E. Michigan Ave.
Kalamazoo, MI 49007

/s/ Franklin B. Molin
Franklin B. Molin

In re Registration of
Michael Marryshow
Registration No. 3,206,010
Registered: February 6, 2007
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ORDER

BY THE BOARD:

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Registration of
Michael Marryshow
Registration No. 3,206,010
Registered: February 6, 2007
Mark: DUB WISE plus Design
International Class 25

_____)	
GORDO ENTERPRISES INC.,)	Cancellation No. 92049073
)	
Petitioner,)	
)	
v.)	
)	
MICHAEL MARRYSHOW,)	
)	
Registrant.)	
_____)	

Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

BRIEF IN SUPPORT OF MOTION TO DISMISS

Registrant, Michael Marryshow ("Registrant"), has moved to dismiss the Petition for Cancellation (the "Petition") filed by petitioner, Gordo Enterprises, Inc. ("Petitioner"), because Petitioner has failed to state a claim upon which relief can be granted.

I. SUMMARY OF ALLEGATIONS

On or about March 26, 2008, Petitioner filed a Petition with the United States Patent and Trademark Office to cancel the registered mark of Registrant, Registration No. 3,206,010. Petitioner merely asserted in his one-line Petition that "We

have been using ?dub? on apparel in class 25 long before defendant.” Petitioner did not allege, however, any additional facts or how Registrant’s mark was likely to cause confusion, mistake, or deception with Petitioner’s mark. (See Petition attached at Exhibit 1.)

II. Legal Standard

A motion to dismiss will be granted under Federal Rule of Civil Procedure 12(b)(6) when the claim “fails to state a claim upon which relief may be granted.” Fed. R. Civ. Proc. § 12(b)(6). When ruling on a 12(b)(6) motion, the Board “must construe the complaint in a light most favorable to plaintiff, accept all well-pled factual allegations as true, and determine whether plaintiff undoubtedly can prove no set of facts in support of those allegations that would entitle him to relief.” *Eidson v. Tenn. Dep’t of Children’s Servs.*, 2007 U.S. App. Lexis 29400, *6, 2007 Fed. App. 0497P (6th Cir. 2007). The claim, however, must “contain either direct or inferential allegations with respect to all the material elements necessary to sustain a recovery under some viable legal theory.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, 127 S. Ct. 1955, 1965 (2007). See also *Jackson v. Novastar Mortgage, Inc.*, No. 06-2249, 2007 WL 4568976, at *4 (W.D. Tenn. Dec. 20, 2007) (“[A] complaint must have a factual foundation, and the mere possibility that a plaintiff might later establish some set of undisclosed facts to support recovery is insufficient to survive a 12(b)(6) challenge”).

In order to prove infringement of a trademark, a petitioner must demonstrate the likelihood of confusion, mistake or deception between petitioner’s mark

and the alleged infringer's use of a similar mark. See Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). A petitioner can demonstrate the likelihood of confusion by alleging: "1) the strength of the owner's mark; 2) the similarity between the owner's mark and the alleged infringer's mark; 3) the degree to which the products compete with each other; 4) the alleged infringer's intent to pass off its goods as those of the trademark owner (but intent is not an element of an infringement claim); 5) incidents of actual confusion; and 6) whether the degree of purchaser care can eliminate any likelihood of confusion which would otherwise exist." *Squirtco v. Seven-Up Co.*, 628 F.2d 1086, 1091 (8th Cir.1980). Once alleged, the Board will then in turn consider the factors. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). Application of these settled principles, as shown below, requires that Registrant's Motion to Dismiss be granted.

III. Discussion

Petitioner has failed to allege facts sufficient to establish a likelihood of confusion, mistake, or deception between Registrant's mark and Petitioner's mark. Petitioner's sole allegation in its petition is "We have been using the 'dub' on apparel in class 25 long before defendant." Even assuming that was true, Petitioner has not established enough facts in support of that allegation to entitle him to relief.

Petitioner has not alleged anything beyond priority and the sale of goods in the same international class. Petitioner has not alleged that the marks are similar, that the marks are in competition with one another, that the marks are used on similar or related goods, that the goods are sold in similar markets and stores, or any other facts that would support any of the likelihood of confusion factors.

Quite simply, Petitioner has failed to allege anything to establish a likelihood of confusion between the marks. The mere fact that Petitioner might later offer facts to support recovery is insufficient to survive a 12(b)(6) challenge.

IV. Conclusion

It is for the foregoing reasons that Registrant's Motion to Dismiss should be granted and Petitioner's Petition for Cancellation should be dismissed in its entirety with prejudice.

Respectfully submitted,

/s/ Franklin B. Molin

Franklin B. Molin, Esq.
Joy J. Royes, Esq.
KIRKPATRICK & LOCKHART, PRESTON
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1500 Oliver Building
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(412) 355-6251
Franklin.molin@klgates.com

Attorney for Registrant
Michael Marryshow

Dated: June 4, 2008

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ANSWER TO PETITION FOR CANCELLATION was served by first class mail on this day, June 4, 2008, upon the following:

John Scott Gordon
Gordo Enterprises Inc.
427 E. Michigan Ave.
Kalamazoo, MI 49007

/s/ Franklin B. Molin
Franklin B. Molin

ESTTA Tracking number: **ESTTA200073**

Filing date: **03/22/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	gordo enterprises inc		
Entity	corp	Citizenship	michigan
Address	427 e michigan ave Kalamazoo, MI 49007 UNITED STATES		

Correspondence information	john scott gordon gordo enterprises inc PO box 50453 Kalamazoo, MI 49005 UNITED STATES gordosnow@aol.com Phone:269-217-4400
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Registration Subject to Cancellation

Registration No	3206010	Registration date	02/06/2007
Registrant	Maryshow, Michael 1133 Decatur Street New Orleans, LA 70116 UNITED STATES		

Goods/Services Subject to Cancellation

Class 025. First Use: 2003/03/15 First Use In Commerce: 2003/03/15 All goods and services in the class are cancelled, namely: clothing, namely t-shirts, women's woven and non-woven tops, blouses, shirts, skirts, dresses, sport pants and jackets, pants, men's woven shirts, jackets, belts, shoes, sandals, hats
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Grounds for Cancellation

Priority and likelihood of confusion	Trademark Act section 2(d)
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Marks Cited by Petitioner as Basis for Cancellation

U.S. Registration No.	2307059	Application Date	04/06/1998
Registration Date	01/11/2000	Foreign Priority Date	NONE
Word Mark	DUB		
Design Mark			
Description of Mark	NONE		

Goods/Services	Class 025. First use: First Use: 1995/01/01 First Use In Commerce: 1995/01/01 Clothing, namely, jackets, pants, jeans, shorts, sweaters, shirts, t-shirts, sweatshirts, hats, belts, gloves, socks, shoes, boots, and insoles
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U.S. Registration No.	2339792	Application Date	04/07/1998
Registration Date	04/11/2000	Foreign Priority Date	NONE
Word Mark	DUB		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 025. First use: First Use: 1995/01/01 First Use In Commerce: 1995/01/01 Clothing, namely, jackets, pants, jeans, shorts, sweaters, shirts, t-shirts, sweatshirts, hats, belts, gloves, socks, shoes, boots, and insoles		

Attachments	75463294#TMSN.gif (1 page)(bytes) 75465595#TMSN.gif (1 page)(bytes) dub wise cancelation.txt (1 page)(76 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by Overnight Courier on this date.

Signature	/johnscottgordon/
Name	john scott gordon
Date	03/22/2008

We have been using the "dub" on apparel in class 25 long before defendant.